

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. MCI WORLDCOM, INC., Respondent.	DOCKET NO. FCU-03-21
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ORDER REGARDING VARIOUS MOTIONS

(Issued July 12, 2004)

On June 22, 2004, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a supplement to its motion for discovery deadline and request for expedited ruling. In its supplement, the Consumer Advocate stated its data requests 3 and 6, which had been submitted to MCI WorldCom, Inc. (MCI), sought information regarding compensation of the telemarketer involved in this case, and data request number 24 requested personnel records of the telemarketer, including, but not limited to, records of compensation and quality control training attended by the telemarketer. The Consumer Advocate stated: "Accordingly, with respect to data requests nos. 3 and 6, OCA seeks an expediting ruling directing MCI by a time certain to provide a specific and complete answer to the question how Debra Johnson was compensated as of November 16, 2002. With respect to data

request no. 24, OCA seeks an expedited ruling directing MCI by a time certain to produce all personnel records on Debra Johnson, including but not limited to records regarding compensation of Debra Johnson and records regarding quality control training attended by Debra Johnson."

On June 23, 2004, a conference regarding scheduling was held in the Utilities Board offices. Mr. Craig Graziano was present representing the Consumer Advocate. Mr. Bret Dublinske was present representing MCI. The parties discussed whether there was a need to postpone the hearing, whether MCI needed additional time to respond to the Consumer Advocate's supplement, and several discovery requests by the Consumer Advocate. The undersigned made a number of rulings during the conference and issued an order on June 24, 2004, setting forth the rulings that had been made during the conference. The order denied the Consumer Advocate's request for the telemarketer's entire personnel file, but ordered MCI to turn over a number of items from the personnel file. In addition, the order included, among others, the following rulings:

2. On or before July 1, 2004, MCI will provide the following additional detail regarding the answers to data requests 3 and 6 to the Consumer Advocate and will file a copy as a pre-filed exhibit. Using the answer to data request 3, MCI will provide an example that shows specifically how Debra Johnson was compensated. The answer will plug numbers into the basis for compensation and show, for example, how her salary was calculated for a typical day, pay period, or month. MCI will provide a more detailed, thorough answer to data request 6 that includes an example of how she was compensated. If the Consumer Advocate has follow-up questions regarding this information, it will ask them at the hearing rather than submitting additional pre-hearing questions to MCI.

5. Once it receives Ms. Johnson's personnel file, MCI will voluntarily provide a copy of her resume, employment application, and any compensation records that exist in the personnel file to the Consumer Advocate. MCI has requested the personnel file from Reese twice, and will ask Reese when it will provide the file. If MCI cannot obtain the personnel file and provide the information to the Consumer Advocate by July 1, 2004, MCI will file an explanation of why it has not been able to obtain it, the efforts made to obtain it, and a statement of when it can provide this information to the Consumer Advocate.

8. If the Consumer Advocate has follow-up questions based on the information it receives from MCI, Mr. Graziano will ask them at the hearing rather than submitting additional pre-hearing questions to MCI. If the Consumer Advocate believes follow-up questions must be asked prior to the hearing, Mr. Graziano will request a conference call with the undersigned to discuss the matter. There will be no new discovery requests made by either party.

On June 24, 2004, the Consumer Advocate filed a motion for clarification of the order and request for expedited ruling. The Consumer Advocate stated it had attempted since March 4, 2004, to learn the basis upon which the telemarketer was compensated, and it sought clarification of the first sentence of paragraph 5 of the order to conform to what it understood was concluded at the conference. Specifically, the Consumer Advocate sought removal of the qualifier "in the personnel file" as it relates to compensation records for the telemarketer. The Consumer Advocate stated compensation records may not be in the personnel file and the reasons for compelling production do not depend on the file in which the records are placed.

On June 29, 2004, MCI filed a reply to the Consumer Advocate's motion. MCI stated the order required it to provide an example that shows exactly how the

telemarketer is compensated and a more detailed answer to data request number 6, and nothing in the order required it to provide compensation records. MCI stated its attorney's recollection that payroll records were not discussed in connection with data requests 3 and 6, and it was improper for the Consumer Advocate to seek records outside the scope of the original request. MCI further stated it was counsel's recollection that discussions regarding the telemarketer's compensation records instead arose during the discussion regarding the Consumer Advocate's request for the telemarketer's personnel file in data request 24. MCI stated that at the conference, the undersigned administrative law judge worked with the parties to determine what portions of the personnel file might be relevant, and at that time, the Consumer Advocate suggested that payroll records would be one type of record it was seeking. MCI stated, as a result, it was required to produce certain documents from the personnel file, including compensation records. MCI stated that because the ruling was in response to the Consumer Advocate's request for the telemarketer's personnel file, it was appropriate that the decision did not exceed the scope of the request. MCI stated the Consumer Advocate did not request compensation records in its data requests, but only the personnel file. Therefore, MCI requested that the Consumer Advocate not be allowed to broaden its original request. MCI further stated the Consumer Advocate has had two years to seek information and allowing it to broaden its request is akin to seeking new discovery after the undersigned has ruled discovery must stop so the parties have a fair opportunity to prepare for hearing. MCI further stated it had received the

telemarketer's personnel file, the file contains the rate of pay and documents indicating raises were received, and MCI would provide the documents to the Consumer Advocate as ordered.

In an Order Regarding Motion for Clarification issued July 1, 2004, the undersigned made the following findings and order.

At the conference held on June 23, 2004, the undersigned believed the only discovery requests being discussed were more complete answers to data requests 3 and 6 and the Consumer Advocate's request for the telemarketer's personnel file. Therefore, the ruling included only the telemarketer's compensation records in the personnel file. As sometimes happens, differing parties to a conversation can have a different understanding as to what was meant during the conversation. The undersigned and MCI's attorney understood the conversation and resulting ruling to include only those compensation records in the personnel file. Mary Whitman, a Utilities Board attorney, sat in on the conference and took notes. The notes indicate that the conversation was about the telemarketer's personnel file and that MCI's attorney stated MCI would not object to turning over compensation records if they were in the personnel file. During the conversation, the Consumer Advocate's attorney did not object or state he was requesting all compensation records regardless of whether they were in the personnel file or not. However, the Consumer Advocate's attorney apparently understood the conversation and resulting ruling made during the conference to be about all compensation records, regardless of whether they were in the telemarketer's personnel file or not. Therefore, in the motion filed the day after the conference, he sought clarification of the written ruling when it stated it was limited to compensation records in the personnel file.

Due to this misunderstanding, a ruling must be made regarding whether compensation records in addition to those in the personnel file must be provided to the Consumer Advocate. The hearing in this case is set for July 14, 2004. The undersigned has ruled that further questions must be asked at hearing and no new discovery requests may be

made by either party. However, data request number 24 states: "Please give the dates of Debra Johnson's employment with Reese Brothers and produce copies of all personnel or other records or documents regarding Debra Johnson that MCI has either generated on its own or obtained from Reese Brothers either in the ordinary course of business or in the course of investigating Dr. Kilaru's complaint, including, but not limited to, records of quality control training attended by Debra Johnson. Referring to the testimony of Jim Ray, Page 5, please identify all records or documents relating to Debra Johnson's employment that were received by Jim Ray." This data request is written broadly enough so it could be interpreted to include compensation records of Ms. Johnson that MCI has either generated on its own or obtained from Reese Brothers either in the ordinary course of business or in the course of investigating Dr. Kilaru's complaint, regardless of whether they are in Ms. Johnson's personnel file or not. Since the Consumer Advocate submitted this data request to MCI on June 11, 2004¹, prior to the ruling that there would be no new discovery requests made by either party, it cannot be said this request violates the prohibition on new discovery.

It does not appear that requiring MCI to turn over compensation records relating to Ms. Johnson's employment that are already in MCI's possession would be overly burdensome or unreasonable. However, data request no. 24 did not ask for compensation records relating to Ms. Johnson's employment that are not in MCI's possession, and the Consumer Advocate cannot expand the data request through its motion for clarification. Additionally, it would be burdensome and unreasonable to require MCI to obtain additional records not currently in its possession at this late date. Furthermore, it would violate the ruling that there be no new discovery requests.

IT IS THEREFORE ORDERED:

1. On or before July 7, 2004, MCI must provide copies of all compensation records regarding Ms. Johnson that MCI has either generated on its own or obtained from Reese Brothers either in the ordinary course of business or in the

¹ See "OCA Exhibits" filed June 21, 2004.

course of investigating Dr. Kilaru's complaint to the Consumer Advocate.

On July 1, 2004, the Consumer Advocate filed a "Reply on Motion for Clarification." In the reply, the Consumer Advocate stated it supported the order that MCI provide a sample illustration of how compensation worked, that sample illustrations are not the same as relevant source documents, and that it was entitled to relevant source documents on compensation of Ms. Johnson, if they exist. The Consumer Advocate further stated data request no. 24 was not limited to the personnel file, that the Consumer Advocate may have contributed to the confusion by a short-hand reference to personnel records, but that was no reason to deny relevant discovery. It further stated the file in which records are placed is immaterial and discovery rules are liberally construed to secure relevant disclosure pretrial, and "if a new data request must be sent to provide requisite specificity in the request, OCA asks leave to submit a new data request for source documents on compensation to Johnson, but the request already appears in data request no. 24 and the subsequent motion supplement."

It is unclear whether the Consumer Advocate had a copy of the order issued July 1, 2004, when it drafted the reply, so it is unclear whether the Consumer Advocate's reply was in response to MCI's "Reply to the OCA's Motion for Clarification" filed June 29, 2004, or was in response to the order issued July 1, 2004. The order issued July 1, 2004, dealt with the issue discussed in the Consumer Advocate's reply filed on the same date. The arguments in the Consumer Advocate's reply are similar to those previously made and present no persuasive reason to

change the ruling. Therefore, the findings and order issued on July 1, 2004, remain in effect.

Also on July 1, 2004, the Consumer Advocate filed a "Request for Leave to Submit Additional Data Request and Request for Expedited Ruling." The request stated it followed the ruling on the Consumer Advocate's motion for clarification. In the request, the Consumer Advocate stated discovery had been difficult because MCI has refused and delayed response, requiring MCI to produce documents in its possession when the documents are in the possession of its agent is useless, as is allowing the Consumer Advocate to ask MCI's witness for documents at hearing that the witness will not bring to hearing. The Consumer Advocate further stated that imposing a rigid deadline on the sending of new data requests, even if within the spirit of old requests, is unsound, especially where, as here, the deadline is imposed on-the-spot and without prior notice. The Consumer Advocate further stated the deadline imposed at the June 23, 2004, conference was not rigid, and to the Consumer Advocate's recollection, it was instructed to request leave to send an additional data request. The Consumer Advocate requested it be allowed to submit the following data request and receive the response pre-hearing: "Please produce all source documents on compensation to telemarketer Johnson during the course of employment with Reese Brothers."

Also on July 1, 2004, MCI filed a request for confidentiality, confidential Exhibits JMR-106 and JMR-107, and "MCI's Exhibits JMR-106 and JMR-107 and Statement of Status of Data Requests." The Board, not the undersigned, rules on all

requests for confidentiality. Until the Board has ruled on the confidentiality requests, the undersigned and the parties must treat the information as if it were confidential.

In its statement, MCI stated it was filing Exhibits JMR-106 and JMR-107 as additional detail regarding its responses to data requests 3 and 6. It further stated it had provided the Consumer Advocate with the two exhibits, various training materials, and the required documents from Ms. Johnson's personnel file. MCI stated it had been unable to locate a signed copy of Exhibit JMR-102, could not provide it, and would provide it if found. MCI stated it would provide additional documents concerning quality control to the Consumer Advocate once they were available.

On July 2, 2004, the Consumer Advocate filed an "Amendment to Request for Leave to Submit Additional Data Request." The Consumer Advocate acknowledged receipt of MCI Exhibits 106 and 107, and as a result, amended its request for an additional data request. The Consumer Advocate asked that MCI be directed to answer the following data request no later than July 9, 2004: "Please either admit data request no. 6 or identify each pay period for which Debra Johnson received compensation from Reese Brothers. For each identified pay period, please provide (i) gross pay, in dollars and cents; (ii) portion of gross pay based on hourly rate, in dollars and cents; (iii) portion of gross pay not based on hourly rate, in dollars and cents. For each entry in response to (iii), please explain how and on what basis the figure was computed. Please provide copies of source documents." On July 2, 2004, the Consumer Advocate also filed a "Partial Resistance to Request for Confidentiality." As stated above, the Board will rule on all confidentiality requests.

On July 2, 2004, MCI filed its "Resistance to the OCA's Requests for Leave to Submit Additional Data Requests" and a "Reply to Resistance to Request for Confidentiality and Motion for Protective Order." In its resistance, MCI requested that the Consumer Advocate's requests to submit additional data requests be denied because it would be burdensome and unreasonable to require MCI to obtain records not currently in its possession at this late date. MCI also stated it would violate the prior order that there be no further discovery requests. MCI stated it did not have any of the documents requested by the Consumer Advocate in its possession, the documents belong to MCI's third party contractor, Reese Brothers, and MCI has had difficulty obtaining information from Reese Brothers in the seven-day timeframe outlined in the Board's rules. MCI stated the new requests seek information that is more detailed and voluminous than any prior requests, and with the upcoming holiday weekend, it is likely it would be unable to obtain the information by the July 9th deadline requested by the Consumer Advocate, or even by the July 14th hearing date. MCI further stated the requested documents have little relevance to the issues in this case, the Consumer Advocate already knows the basis on which Ms. Johnson was compensated, and yet it seeks the specific information of how much she was paid each paycheck. MCI stated that, while it acknowledged the rules of discovery and evidence are broader in an administrative case, it is difficult to understand what relevance these additional requests have to this proceeding. MCI argued that Ms. Johnson's paychecks have no relevance to whether MCI should be assessed civil penalties, the actual issue in this proceeding.

In its "Reply to Resistance to Request for Confidentiality and Motion for Protective Order," MCI made a number of arguments related to the confidentiality issue, which will be ruled on by the Board and not addressed here. In the same document, MCI requested a protective order that the Consumer Advocate file no more discovery requests and no more motions. One of the reasons MCI seeks a protective order relates to the Consumer Advocate's request to remove confidentiality of a portion of the contract between MCI and Reese Brothers, which will be ruled on by the Board. MCI also makes the following arguments in support of its request for a protective order. MCI stated its belief that the Consumer Advocate is not conducting this case in good faith and that the Consumer Advocate had sent demand letters threatening to involve the administrative law judge when MCI's attorney, Ms. Tanner, had told the Consumer Advocate's attorney, Mr. Graziano, she would be in trial and unavailable on the day MCI's testimony and brief were due, and when Mr. Graziano had been told information was unavailable due to Ms. Tanner's father's funeral. MCI further stated the Consumer Advocate caused MCI to spend nearly a week negotiating stipulated facts which the Consumer Advocate walked away from, stranding over \$1000 of MCI's investment. It stated the Consumer Advocate has continued to serve additional data requests after being ordered to stop and has continued to file a series of minor motions that serve no legitimate purpose but to monopolize MCI's time and force MCI to expend resources. MCI stated in the first 21 days of June, Mr. Graziano sent Mr. Dublinske 20 electronic mail messages, not including paper mail or email from the undersigned caused by a Consumer Advocate

filing. MCI argued this amounts to an average of more than one communication per business day that the Consumer Advocate expects to have answered promptly, which amounts to monopolization of resources. MCI argued reading and responding to communications adds up to thousands of dollars in fees, the Consumer Advocate should not be allowed to pull the strings of MCI's pocketbook, and the Consumer Advocate's prosecution tactics, which have lacked any sense of perspective, have forced MCI to spend \$18,000 to date on a claim with a maximum penalty of \$10,000. MCI further argued Mr. Graziano's position is well known that he desires slamming complaints to be treated like traffic tickets, the majority of those charged pay without a fight, and MCI concludes that making defense prohibitively difficult and expensive is an intentional part of Mr. Graziano's strategy to force companies like MCI to just "pay the ticket." MCI argued this is an improper use of regulatory authority as it ignores the merits of individual cases and deters defense even by companies who have done nothing wrong. MCI argued the Board should not permit the Consumer Advocate to engage in tactics like these that, whether intentional or not, have that effect. MCI further argued the case is set for hearing in less than two weeks, and in civil court, discovery would have been closed 60 – 90 days out, nearly all motions would have stopped long ago, and the parties would be given a fair opportunity to prepare a defense. MCI argued that endless permutations on discovery and motions with no apparent benefit deny MCI that opportunity. MCI stated it believed the Consumer Advocate had been cautioned at the oral conference and in the resulting ruling, and it

requested an order that the Consumer Advocate file no more data requests and no more motions.

The undersigned was out of the office on July 2 and 5, 2004, and therefore did not receive the above filings until July 6, 2004. Furthermore, the undersigned had a hearing on July 8, 2004, which required her attention for preparation and conduct of the hearing.

On July 6, 2004, the Consumer Advocate filed a "Response to Motion for Protective Order." The Consumer Advocate stated it supported MCI's right to defend itself vigorously but opposed its positions on discovery and the merits. The Consumer Advocate also included an argument related to its partial resistance to request for confidentiality, which will be ruled on by the Board and not addressed here.

On July 8, 2004, MCI filed a "Request for Confidentiality," which will be ruled on by the Board.

Iowa Code § 17A.13(1) (2003) states that discovery procedures applicable to civil actions are available to parties in contested cases. In addition, 199 IAC 7.7(1)"c" states that data requests or interrogatories lodged by any party shall either be responded to or objected to within seven days. Discovery rules are to be liberally construed and enforced to provide the parties with access to all relevant facts, and discovery is to be conducted in good faith. Iowa R. Civ. P. 1.501. Responses to discovery requests shall fairly address and meet the substance of the request. Id. Unless otherwise ordered under rule 1.504, the frequency of use of discovery

methods is not limited. Id. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, including documents. Iowa R. Civ. P. 1.503. Upon motion and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: 1) that the discovery not be had; 2) that the discovery may be had on specified terms and conditions, including a designation of the time or place; 3) that the discovery may be had only by a different method of discovery; 4) that the scope of the discovery be limited; and 5) a number of other listed ways not relevant to this case. Iowa R. Civ. P. 1.504. The court may limit the frequency of use of the methods if it determines that any of the following applies: 1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; 2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or 3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. Iowa R. Civ. P. 1.504.

"A protective order precluding discovery is the most restrictive type of protective order," and "ordinarily, a claim of undue burden and expense is not a sufficient reason for precluding discovery of relevant materials." Berg v. Des Moines General Hospital Co., 456 N.W.2d 173 (Iowa 1990). "Rather, burdensomeness may,

upon a proper showing, be a basis for limiting discovery." Berg, supra at 177; Pollock v. Deere and Co., 282 N.W.2d 735 (Iowa 1979). "A certain amount of inconvenience inheres in discovery and must be tolerated by the parties. Pollock, 282 N.W.2d at 739. Nonetheless, where the nature and complexity of the inquiry show compliance with the discovery request could require an unreasonable amount of time and an unreasonable expenditure of money, a protective order is appropriate." Berg, supra at 177.

The hearing is set for July 14, 2004. Ruling on the Consumer Advocate's request to submit an additional data request requires a careful balancing of the Consumer Advocate's right to receive discovery materials and the burden potentially placed on MCI by having to produce the requested information. Also important is consideration of the materials already provided to the Consumer Advocate regarding the same subject and the timing of the request. The spirit of this order is not to limit the Consumer Advocate's access to information needed to present its case. Rather, it is made in recognition of the parties' and the undersigned administrative law judge's need for adequate time to prepare for hearing at this late date.

In this case, the Consumer Advocate has requested the basis of Ms. Johnson's compensation by Reese Brothers and MCI has provided the answer in MCI Exhibits JMR-106 and JMR-107, which contain details of how Ms. Johnson was compensated, including an example with specific numbers. However, the exhibits do not answer the question of what the amount of the bonus would have been if one had been received by Ms. Johnson, and this still needs to be provided at hearing. MCI

must be able to answer the question of the amount of the bonus Ms. Johnson could have received in the example given, if she had received a bonus during the pay period. Additionally, the Consumer Advocate and the undersigned may have follow-up questions regarding the exhibits. MCI must have a witness at the hearing who can answer detailed follow-up questions regarding the exhibits and how Ms. Johnson was compensated. In addition, MCI must bring the source documents it used to create Exhibits JMR-106 and JMR-107 to the hearing and provide them to the Consumer Advocate immediately prior to hearing. At the hearing, MCI must also provide an example of a pay period in which Ms. Johnson did receive a bonus, if any, with the source documents used to create the example. MCI must provide the example and source documents to the Consumer Advocate immediately prior to hearing. If the Consumer Advocate needs time for review of the documents on the date of the hearing, a reasonable accommodation will be made.

Additionally, the exhibits do not include the specific admission requested by data request number six, although it appears the answer can be determined by the exhibits. It would not be unreasonably burdensome for MCI to provide a specific, written answer to data request six to the Consumer Advocate, and it must provide this at the hearing, if it has not already done so.

If MCI has already obtained compensation records regarding Ms. Johnson from Reese Brothers, it must provide them to the Consumer Advocate.

The purpose of the above rulings is to allow the Consumer Advocate and the undersigned to be able to clearly understand how Ms. Johnson was compensated,

and provide sufficient source documents so the Consumer Advocate may verify the examples and testimony are accurate, without unduly burdening MCI immediately prior to hearing. MCI must provide the information detailed above, but it does not have to provide the Consumer Advocate with the remainder of the documents requested in the "Request for Leave to Submit Additional Data Requests and Request for Expedited Ruling" filed July 1, 2004, or the information requested in the "Amendment to Request for Leave to Submit Additional Data Request" filed July 2, 2004.

IT IS THEREFORE ORDERED:

MCI and the Consumer Advocate must comply with the rulings made in the body of this order.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 12th day of July, 2004.